TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~313.~~ 86

EMANUEL BAST, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF ASHLAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 4, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 313.

EMANUEL BAST, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF ASHLAND.

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1 UNITED STATES OF AMERICA, *sct.:*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between The First National Bank of Ashland, Pennsylvania, plaintiffs, and Emanuel Bast, defendant, in a plea of trespass on the case, a manifest error has entervened to the great damage of the said Emanuel Bast, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the party aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twentieth day of October, A. D. one thousand eight hundred and seventy-six, and in one hundred and first year of the Independence of the said United States.

[SEAL.] SAMUEL BELL,
Clerk U. S. Cir. Ct E. D. of Pa.

Allowed.

W. M. KENNAN,
Cir. Judge.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania:

In obedience to the above writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand, at office in the city of Philadelphia, in said district, this 23rd day of November, A. D. 1876.

SAMUEL BELL,
Clerk Cir. Ct U. S. E. D. of Pa.

2, 3 In the circuit court of the United States for the eastern district of Pennsylvania in the third circuit. Of April session, 1876. No. 52.

Pleas and proceedings before the honorable the judges of the said court.

It is thus contained.

Be it remembered that on the eighth day of August, in the year of our Lord one thousand eight hundred and seventy-six, the First National Bank of Ashland, Pennsylvania, by Rudolph M. Shick, esquire, its attorney, comes into our said court here and sues forth therefrom a writ of summons on the case, which said writ having been served and returned, is in the words and figures to wit:

4 UNITED STATES,
Eastern District of Pennsylvania, set:

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

We command you that you summon Emanuel Bast, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court to be holden at Philadelphia, on the first Monday of August, instant, to answer to The First National Bank of Ashland, Pennsylvania, in a plea of trespass on the case.

And have you then there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this second day of August, A. D. 1876, and in the 101st year of the Independence of the United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

5 August 4th, 1876, at Ashland, in my district, served the within writ on Emanuel Bast, by leaving a true and attested copy thereof at his dwelling house with an adult member of his family, to wit, Sarah Bast.

So answers—

JAMES N. KERNS,
U. S. Marshal,
Per C. McCORMICK,
S. Deputy.

(Indorsed:) No. 52. Circuit court, October session, 1876. The First National Bank of Ashland, Pa., vs. Bast. Summons. Case. Returnable on the first Monday of August, inst. R. M. Shick, attorney for plaintiff. Filed 8th August, 1876. $2.40.

6 And afterwards, to wit, on the 10th day of August, in the year last aforesaid, the said plaintiff, by his attorney aforesaid, comes into our said court here and files his copies of notes on which suit is brought, which said copies being read are as follows, to wit:

Copies of notes on which this suit is brought are as follows:

$2,000. PHILAD'A, *March 1st*, 1876.

Four months after date I promise to pay to Wm. Torrey, cash'r, or order, two thousand doll's $\frac{00}{100}$, without defalcation, for value received. Payable at First National Bank of Ashland.

(Signed) EMANUEL BAST.

(Endorsed:) Cost of protest, $1.71.

Judgment in court of common pleas of Schuylkill County of June term, 1875, No. 1292, for $7,203.18, being held as collateral for within note.

WILLIAM TORREY,
Cash'r.

$2,000$\frac{00}{100}$. PHILAD'A, *March 1st*, 1876.

Four months after date I promise to pay to Wm. Torrey, cash'r, or order,

two thousand doll's $\frac{00}{100}$, without defalcation, for value received. Payable at First National Bank of Ashland.

(Signed) EMANUEL BAST.

(Endorsed:) Cost of protest, $1.71.

7 Judgment in court of common pleas of Schuylkill County of June term, 1875, No. 1292, for $7,203.18, being held as collateral for within note.

WILLIAM TORREY,
Cash'r.

$3,481\frac{79}{100}$. PHILAD'A, *March 1st*, 1876.

Four months after date I promise to pay to Wm. Torrey, cash'r, or order, thirty-four hundred and eighty-one $\frac{79}{100}$, doll's $\frac{00}{100}$ without defalcation, for value received. Payable at First National Bank of Ashland.

(Signed) EMANUEL BAST.

(Endorsed:) Cost of protest, $1.71.

Judgment in court of common pleas of Schuylkill County of June term, 1875, No. 1292, for $7,203.18, being held as collateral for within note.

WILLIAM TORREY,
Cash'r.

RUD. M. SCHICK,
Pl'f's Att'y.

At or about the time the above notes were made and delivered a judgment of the court of common pleas of Schuylkill County and three several drafts were assigned as collateral security for the said notes by a writing of which the following is a copy:

Know all men by these presents that I, Emanuel Bast, do hereby transfer and assign to William Torrey, cashier, of Ashland, Penn'a, a cer-
8 tain judgment of June term, 1875, in court of common pleas of Schuylkill County, No. 1292, in which the First National Bank of Ashland is plaintiff and the Ringgold Iron and Coal Company is defendant, and the three several drafts upon which the said judgment was obtained as collateral security for the payment of two notes of $2,000.00 each and one for $3,481.69, made by me to order of William Torrey, cashier, dated March 1st, 1876, payable in four months after date, and upon failure on my part to pay said notes at maturity or at the maturity of time for which the same may be renewed, then the said Torrey, cashier, is hereby authorized and empowered to sell the same at public sale after ten days' notice to me and apply the proceeds thereof to payment of my said notes, and in case the proceeds of same shall not be sufficient to pay said notes, then I promise to pay any balance that may be due.

In witness whereof I have hereunto set my hand and seal this 1st day of March, 1876.

EMANUEL BAST. [SEAL.]

Witness:
A. P. SPINNEY.
S. HENRY NORRIS.

The notes sued on became due and were unpaid. In pursuance of the above agreement the said judgment and drafts were sold.

The sale amounted to		$2,150 00
The auctioneer's charge was	$5 00	
The cost of advertising was	4 00	9 00
		2,141 00

9 The above sum of $2,141.00 will be allowed as a credit on the notes sued upon in the assessment of damages.

RUD. M. SCHICK,
Pl'f's Att'y.

(Indorsed:) 52. Ap'l sess., 1'76. U. S. C. C. Bank of Ashland vs. E. Bast. Copies of notes on which suit is brought. Filed August 10, 1876. Schick.

10 And afterwards, to wit, on the twenty-fourth day of August, 1876, the said defendant, by Francis W. Hughes, esquire, his attorney, comes into our said court here and presents his affidavit of defence, which, being read and filed, is as follows, to wit:

PHILADELPHIA CITY, *ss:*

Emanuel Bast, the defendant above named, having been duly sworn according to law, doth depose and say that he has a just and full defence to the whole of the plaintiff's demand in this case of the following nature, viz: That simultaneously with the making and delivery of the notes of which the copies have been filed in this case, this deponent assigned to said plaintiffs, the holder of said notes, and the payee in the name of William Torry, cashier (the said Torry being then the cashier of said bank), a certain judgment then belonging to this deponent entered in the court of common pleas of Schuylkill County, for the sum of $7,203.18, which, with interest to the first day of March, A. D. 1876, when said notes were given as aforesaid, amounted to the sum of
11 $7,481.79, being the aggregate amount of said notes which said judgment (originally in the name of said bank as plaintiff) the said bank then received and held as collateral security for the said notes so given by deponent as aforesaid. That the said judgment was then due and owing, and no legal impediment or reason existed why the said bank might not have issued execution thereon. That from that time up to the nineteenth day of May, A. D. 1876, the Ringgold Iron Company, which was the defendant in said judgment, was the owner of a large amount of personal property in said county of a value greater than the whole amount of said judgment as well as of said note. That had said bank issued execution at any time prior to the last-mentioned date the whole amount of said notes could have been paid by the proceeds of sale of said personal property under any execution that said bank could have issued upon said judgment as aforesaid. That deponent is informed by his counsel, and he verily believes that it was the duty of said bank to have issued execution upon said
12 judgment prior to said last mentioned date, whereby said notes would have been paid as aforesaid, and this deponent thereby discharged from said notes. And deponent further says that while the total of said notes could have been realized as aforesaid, and would have been but for the neglect of duty of said bank as aforesaid, deponent further says that simultaneously with his delivery of said notes to said bank as aforesaid as well as said assignment of said judgment as collateral security for the same, it was agreed between deponent and said

bank as part of the transaction that said bank would issue execution upon said judgment, and proceed to collect the same whenever the money could be made thereon. Wherefore defendant further says that he has been damaged by said neglect of said bank as well as by the violation of the agreement aforesaid to the full amount of said notes, and he claims that he is therefore discharged from making any further payment of anything on account of said notes and to set off said damages.

Deponent further says that he denies and desires to receive all
13 benefit of any legal exception to the right of the plaintiff to sue him in said circuit court for the claim demanded in this suit, because he says that said plaintiff is or claims to be a banking institution and corporation having its place of business at Ashland, in Schuylkill County, Penna. and this deponent has been for years past and still is a resident of the same place.

EMANUEL BAST.

Sworn and subscribed before me this twenty-fourth day of August, A. D. 1876.

W. GRIER HIBLER,
U. S. Commissioner.

14 And afterwards, to wit, on the twelfth day of September, in the year last aforesaid, the First National Bank of Ashland, Pennsylvania, by R. M. Schick, esquire, its attorney, comes into our said court here and asks for a rule for judgment, which is in the words and of the tenor following, to wit:

And now, Sept. 12, 1876, on motion of Mr. R. M. Schick, pl'f's att'y, the court granted a rule on defendant in this case to show cause why judgment should not be entered against him in favor of the plaintiff for want of a sufficient affidavit of defense. Returnable to Tuesday next, September 19th, 1876.

15 And afterwards, to wit, on the twentieth day of September, A.D. 1876, the said defendant, Emanuel Bast, by Francis W. Hughes, esquire, his attorney, comes into our said court here and files his supplementary affidavit of defence, which said supplementary affidavit of defence is as follows, to wit:

Emanuel Bast, the defendant above named, being duly sworn according to law, for a further or more explicit statement of his defense to the plaintiff's claim in the above case, deposeth and saith that the said The First National Bank of Ashland never did issue execution upon the judgment assigned to it as set out in affidavit of defence filed in this case until the nineteenth day of June, but subsequent to such assignment, to wit, May 19th, 1876, an execution was issued upon another judgment and all the personal property of the said The Ringgold Coal and Iron Company, the defendant in said judgment, so assigned to plaintiff, as set out in said affidavit of defence, was levied upon and sold, and the whole proceeds applied to such prior execution, and
16 *and* all of the real estate of the said The Ringgold Coal and Iron Company is encumbered by liens prior to said assigned judgment, is a greater amount than such real estate will bring at public judicial sale.

Deponent further saith that by reason of the supine neglect of the

plaintiff in not issuing execution as aforesaid, the said judgment assigned to it as aforesaid as collateral security for the payment of the notes sought to be collected in this case was lost and became worthless, whereby deponent suffered damages to an amount equal to the full amount due upon the notes in suit.

Deponent further says that all the facts set forth in his said affidavit of defence, and also all the facts set forth in this supplementary affidavit of defence, are true, and that he expects to be able to prove the same upon the trial of the cause.

EMANUEL BAST.

Sworn and subscribed to this 20th day of Sept'r, 1876.

[SEAL.] SAMUEL BELL,
U. S. Comm'r.

17 And afterwards, to wit, on the seventeenth day of October, A. D. 1876, the said plaintiff, by his attorney aforesaid, comes into our said court, before the honorable William McKennan, judge of the third judicial circuit, presiding judge, and the honorable John Cadwalader, district judge, and prays that his rule may be made absolute; whereupon the following order is entered:

And now, to wit, this 17th day of October, 1876, rule made absolute, and judgment ordered in favor of plaintiff and against defendant, the clerk to asses the damages; whereupon the clerk assesses the damages at five thousand four hundred and forty $\frac{4}{100}$ dollars, ($5,440\frac{4}{100}$.)

18 And afterwards, to wit, on the twenty-seventh day of October of the year aforesaid, came the said defendant, by his said attorney, and filed in the clerk's office of said court his affidavit that the writ of error is not intended for delay, which said affidavit is in the words following, to wit:

Circuit court of the United States for the eastern district of Pennsylvania. April sessions, 1876. No. 52.

EMANUEL BAST
vs.
THE FIRST NATIONAL BANK OF ASHLAND.

Emanuel Bast, being duly sworn according to law, doth depose and say that the writ of error sued out in the above case is not intended for delay.

EMANUEL BAST.

Sworn and subscribed before me this 27th day of October, A. D. 1867.

SAMUEL BELL,
U. S. Com'er.

19 (Indorsed:) No. 52. April sess., 1876. C. C. U. S., E. D. of Pa. First National Bank of Ashland, Pa., vs. Bast. Affidavit that the writ of error is not intended for delay. Filed October 27, 1876.

20 And afterwards, to wit, on the thirty-first day of October of the year aforesaid, came the said defendant, by his said attorney, and filed in the clerk's office of said court his specifications of error, which said specifications are in the words following, to wit:

April sess., 1876.

THE FIRST NATIONAL BANK OF ASHLAND, PA., vs. BAST. No. 52.

Exceptions and specifications of errors to the judgment of the learned circuit court.

1st. The learned circuit court erred in entering judgment for want of sufficient affidavit of defence.

2nd. The affidavit and supplemental affidavit of defence state matters of fact that constitute a complete defence, and the learned circuit court should have declined to enter the judgment.

3rd. The circuit court had not jurisdiction of the parties, as the First National Bank of Ashland, the plaintiff below, purported to be a banking corporation created under the so-called national bank acts of Congress, but Congress has no constitutional power to create such banking corporation.

21

F. W. HUGHES,
Attorney for Emanuel Bast, Pl'ff in Error.

(Indorsed:) No. 52. April sess., 1876. C. C. U. S., E. D. of Pa. The First National Bank of Ashland, Pa. vs. Bast. Specifications of error. Filed October 31, 1876.

22 Then afterwards, to wit, on the thirty-first day of October of the year aforesaid, came again said defendant, by his said attorney, and filed in the clerk's office of said court his bond herein, which said bond is in the words following, to wit:

Know all men by these presents that we, Emanuel Bast, Decatur E. Nice, and Gideon Bast, all of the county of Schuylkill, and State of Pennsylvania, are held and firmly bound unto the First National Bank of Ashland, Pennsylvania, in the sum of twelve thousand dollars, lawful money of the United States of America, to which payment well and truly to be made we do bind and oblige ourselves, our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this thirtieth day of October, anno Domini eighteen hundred and seventy-six (1876).

Whereas in the above-entitled suit a judgment was rendered against the above-named defendant, Emanuel Bast, to which judgment a writ of error from the Supreme Court of the United States has been obtained by the said Emanuel Bast, the same being returnable to the second Monday of October, A. D. 1877:

Now, the condition of this objigation is such that if the said Emanuel Bast shall prosecute the said writ of error to effect, and answer
23 all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EMANUEL BAST. [SEAL.]
DECATUR S. NICE. [SEAL.]
GIDEON BAST. [SEAL.]

Sealed and delivered in the presence of us—
GUY E. FARQUHAR.
JNO. P. HOBART.

Approved by—

JOHN CADWALADER,
Judge.

(Indorsed:) Bond. Emanuel Bast et al. to The First National Bank of Ashland, Pennsylvania. Filed October 31, 1876.

24 THE UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Ashland, Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant of a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Emanuel Bast is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-six.

W. McKENNAN,
Cir. Judge.

1876, OCTOBER 21.

I hereby accept service of the within citation for defendant in error, and direct the clerk to make my appearance for defendant in error.

RUD. M. SCHICK,
Att'y for Df't in Error.

25 (Indorsed:) The First National Bank of Ashland, Pennsylvania, vs. Emanuel Bast. Citation sur writ of error.

26 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Samuel Bell, clerk of the circuit court of the United States in and for the eastern district of Pennsylvania, do hereby certify that I have compared the above and foregoing with the original record and proceedings in said entitled cause now remaining on file and of record in my office in the city of Philadelphia in said district, and that the same is a true and correct transcript therefrom, and also a true copy of the bond on writ of error and citation.

In witness whereof I have hereunto set my hand and affixed the seal of the said circuit court of the United States for the eastern district of Pennsylvania, at my office in the city of Philadelphia, this 23rd day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] SAMUEL BELL,
Clerk, &c.

(Indorsement on cover:) No. 313. Emanuel Bast, plaintiff in error, vs. The First National Bank of Ashland. E. Pennsylvania C. C. U. S. Filed 4th December, 1876.

In the Supreme Court of the United States

No. 313.

EMANUEL BAST,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK
OF ASHLAND,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief for Plaintiff in Error.

HUGHES & FARQUHAR,
Counsel for Plaintiff in Error.

Miners' Journal Book Rooms.

In the Supreme Court of the United States.

OCTOBER TERM, 1877. No. 313.

EMANUEL BAST, *Plaintiff in Error*,

vs.

THE FIRST NATIONAL BANK OF ASHLAND, PENNSYLVANIA.

FACTS OF THE CASE.

This is a Writ of Error to the Circuit Court of the United States in and for the Eastern District of Pennsylvania.

On the 1st day of March, A. D. 1876, Emanuel Bast, the plaintiff in error, made his three certain promissory notes, each bearing date on said day, and payable to the order of William Torry, cashier of said Bank, four months after said date; the one thereof for the sum of three thousand, four hundred and eight-one dollars and seventy-nine cents ($3,481.79), and the other two for the sum of two thousand dollars each. On the same day said Bast assigned to said Torry, cashier as aforesaid, as collateral security for the payment of said notes, a judgment in the Court of Common Pleas of Schuylkill County, which said Bast then owned against the Ringgold Iron and Coal Company (a corporation created under the laws of Pennsylvania, and doing business in said county), upon which judgment there was then due and payable the sum of seven thousand, four hundred and eight-one dollars and seventy-nine cents ($7,481.79). Said judgment was at that time ripe for execution, and execution could have been issued thereon at once. This judgment was accepted by said Bank as such collateral security, and it was agreed between said Bast and said Bank,

at the time of the delivery of said notes and the said assignment of said judgment, as part of said transaction, that said Bank would issue execution upon said judgment and proceed to collect the same whenever the money could be made thereon.

That from said 1st March, 1876, up to the 19th May, 1876, said Coal and Iron Company, the defendant in said judgment, was the owner of a large amount of personal property in said county of a value greater than the whole amount of said judgment as well as of said notes, and if the said bank had issued execution at any time prior to said 19th May, 1876, the whole amount of said notes could have been paid by the proceeds of sale of said personal property, under any execution that said Bank could have issued upon said judgment as aforesaid. The said Bank failed and neglected to issue any execution until the 19th June, 1876, before which time, to wit: on 19th May, 1876, execution was issued upon another judgment, and all said personal property was levied upon and sold, and the whole proceeds applied to such prior execution, and all of the real estate of said Iron and Coal Company was encumbered by liens prior to said assigned judgment to a greater amount than such real estate would bring at public judicial sale, so that by reason of such failure and neglect to issue execution, said assigned judgment became worthless, and was wholly lost.

On the 2d day of August, 1876, the said Bank brought this suit in the said Circuit Court of the United States, to recover the amount due upon said notes. The said Bast filed affidavits of defense, setting out in substance the foregoing facts, and claiming that he had been damaged by said neglect of said Bank, as well as by the violation of the agreement aforesaid, to the full amount of said notes, and that he was therefore discharged from making any further payment of anything on account of said notes, and to set off said damages.

On the 17th October, 1876, the said Circuit Court entered judgment in favor of said Bank and against said Bast for the

sum of five thousand, four hundred and forty dollars and forty-six cents ($5,440.46), for want of a sufficient affidavit of defense.

ASSIGNMENT OF ERROR.

1. The learned Circuit Court erred in entering judgment for want of sufficient affidavit of defense.

2. The affidavit and supplemental affidavit of defense state matters of fact that constitute a complete defense, and the learned Circuit Court should have declined to enter the judgment.

3. The Circuit Court had not jurisdiction of the parties, as the First National Bank, the plaintiff below, purported to be a banking corporation created under the so-called National Bank Acts of Congress, but Congress has no constitutional power to create such banking corporation.

BRIEF OF ARGUMENT.

There are two positions taken by the plaintiff in error in his affidavit and supplemental affidavit of defense, viz.:

1. That by the assignment of the judgment against the Iron and Coal Company as a collateral security to the Bank, the latter alone had control over it, and having failed to proceed to collect it until after another execution had swept away property, from which the amount of the notes in suit and of the judgment could have been realized if execution had been promptly issued, the Bank must account for the loss to Bast.

2. That the Bank having, when it received the notes in suit and the assignment of the judgment, *agreed in terms* that it would issue execution upon said judgment, and proceed to collect the same whenever the money could be made thereon, and having failed and neglected to issue said execution when

the money could have been made thereon, whereby said Bast was damaged to the full amount of said notes, he has a right to set off said damages in this suit against said notes.

The first proposition involves the question of the liability of the assignee of a collateral security which has been lost by his neglect. In Pennsylvania it is abundantly decided that where a collateral is lost by the insolvency of the debt in the collateral instrument, through the supine negligence of the creditor, he must account for the loss to his own debtor.

In the case of Miller *vs.* Gettysburg Bank, 8 Watts, 192, it is held, viz.: If a claim be transferred to a creditor as a collateral security for the payment of a debt, it is incumbent on such creditor to use ordinary diligence to realize the claim; and he would be responsible for loss occasioned by an omission to do so. But if the transfer be of a special character, authorizing the creditor to receive the claim when collected, then it imposes no resonsibility on the creditor as to the diligent prosecution of it.

In the case of Bank of U. S. *vs.* Peabody, 8 Harris, 454, it is held, viz.: When *collaterals* are placed in the hands of the creditor, and they are lost by his negligence, the debt is extinguished; or where they are not accounted for, he is chargeable with their value; but where they have never been in the posession or control of the creditor, but have been placed by the debtor in the hands of a third person appointed by himself, the creditor may recover on the principal security, though the collaterals be not accounted for.

In the case of the Chambersburg Insurance Co. *vs.* Frederick Smith, for the use of Simeon Nichold, 1 Jones, 120, it is held, viz.: A chose which is transferred as collateral security is put under the dominion of the creditor to make his claim out of it, and is not in the nature of, or subject to the incidents of a pawn or pledge.

In the case of Sellers & Nicols *vs.* Jones, 10 Harris, 423, it is held, viz.: If the notes were received as collateral security

or for the purpose of collection, the holders were bound to use ordinary diligence in their collection, and if the notes were lost for want of such attention, they would be liable to the owner to the extent of the injury; but if they were left with the holders, merely that they might receive the metal in which they were payable when it was delivered, they would be liable to account only for the amount received by them.

In the case of Lishy *vs.* O'Brien, 4 Watts, 141, it is held, viz.: A promissory note delivered to the creditor as collateral security is his, and, if not paid when due, he may sue upon it, and it is for the interest of the original debtor that he should do so in most instances, otherwise an available fund might be lost. The creditor is bound to account with his debtor for the proceeds of such security, and cannot have double satisfaction; but he may avail himself of all his remedies by suit.

In the case of Muirhead *vs.* Kirkpatrick, 9 Harris, 237, it is held, viz.: The holder of a note received as *collateral security* is bound to employ reasonable diligence in its collection, and a conversion of it into a less security is such missuse of it as makes him responsible to the original debtor.

In the case of The Girard Fire and Marine Insurance Company *vs.* Marr, 10 Wright, 504, it is held, viz.: The pledgee of collateral securities may exchange them without consent of the pledgors, unless restricted by the express terms of the pledge, but if loss result from the want of proper care and diligence, he is responsible to the pledgor for the extent of the injury.

The reason for this liability is, "that by the assignment a privity of contract is established, which invests the assignee with the ownership of the collateral for all purposes of dominion over the debt assigned. He alone is empowered to receive the money to be paid, and to control it in order to protect his right under the assignment."

In the case of Hanna *vs.* Holton, 28 P. F. Smith, 334, it is

held, viz.: 1. The assignment of a security to a creditor to hold as collateral security of his debt, establishes a privity of contract which invests him with the ownership of the collateral for all purposes of dominion of the debt assigned.

2. When the collateral is lost by the insolvency of the debtor in it, through the supine negligence of the creditor, he must account for the loss to his own debtor.

3. The plaintiff assigned to defendant a judgment against Jackson, the lien of which expired September, 1863, as collateral for money lent to plaintiff; defendant neglected to revive the lien; Jackson sold his land July, 1866, and the judgment against him was lost. *Held* that defendant was liable to plaintiff on the ground of negligence.

In the case of Lyon *vs.* The Huntingdon Bank, 12 S. & R., 68, it is held, viz.: Where it had been testified by some witnesses that certain bonds, which had been *legally* assigned to a bank, with powers of attorney to enter judgment, given at the request of the bank, and of which it retained possession, were assigned as a collateral security, not only for the bank, but also for the endorsers of a note discounted by the bank. *Held* that it was error to charge the jury, that if they believed the fact to be so, the negligence in not entering up the judgments on the bonds and issuing executions was as much the fault of the endorsers as of the bank. It was the bank who insisted on warrants of attorney to confess judgment, and the assignments were made in strict form, according to the Act of Assembly, so that the legal property was vested in the bank, which alone could bring suit. The legal inference is (unless there was proof to contrary) that the bank took upon itself the care of attending to these bonds, and pursuing all legal means to recover them. The obligors could make no legal payment, after notice of the assignment, to any other than the bank; nor could it possibly have been the intent of the parties that the endorser of the ten thousand dollar note should have the right of receiving the money, because that would have been to deprive the bank of its security in the bonds.

In the case of Beale *vs.* The Bank, 5 Watts, 530, it is held, viz.: A judgment assigned as collateral security for the payment of a debt becomes for all purposes the property and under the exclusive control of the assignee. The latter is chargeable if it be lost through his neglect.

The facts of the case of Hanna *vs.* Holton, 28 P. F. Smith, 334, were very similar to this case. A judgment was assigned as collateral security, and the assignee neglected to revive the judgment, or to proceed to collect it until after the defendant in the judgment had become insolvent, whereby it was lost. The assignor brought suit against the assignee to recover damages for such negligence, and the Court held he was entitled to recover.

The foregoing cases would seem to decide conclusively the principle that the holder of a collateral security must account to the assignor thereof for its value, if lost by the negligence of such holder, or by his failure to take the necessary steps to prevent it from becoming worthless or lost, yet the Court below entered judgment for the plaintiff below, and against the defendant, for want of a sufficient affidavit of defense, when such affidavit set forth: 1st, That the defendant below had assigned to the plaintiff below collateral security sufficient to pay the debt sued for, and 2d, That said collateral security had been lost by the neglect of the plaintiff below.

The second proposition is that in an action upon a contract the defendant may recover damages arising out of the same transaction.

The affidavit of defense avers that it was part of the contract that the plaintiff below would proceed by execution to collect the judgment assigned as collateral, whenever the defendant in the judgment had sufficient property out of which it could be made; that the defendant in the judgment did have such property; that the plaintiff below failed and neglected to issue any execution that by reason of such failure and neglect the judgment became worthless and was lost, and that the de-

fendant below was thereby damaged to the full amount claimed by the plaintiff below in this suit.

In the case of Eckel *vs.* Murphy, 15 Penn. State Rep., 488, it is held, viz.: It was agreed that in the course of the execution of the contract to deliver coal, drafts were to be drawn weekly on account; in a suit on one of such drafts the drawer may show subsequent non-performance of the contract by the plaintiff as an equitable defense.

In the case of Hunt *vs.* Gilmore, 59 Penn. St. Rep., 450, it is held, viz.:

1. The Pennsylvania Act of 1705 (Defalcation), was before the British Statute of set-off, 2 Geo. I I, and is more comprehensive.

2. Unliquidated damages arising *ex contractu* from any bargain may be set-off under the Pennsylvania Defalcation Act, whenever they are capable of liquidation by any known legal standard.

In the case of Shaw *vs* Badger, 12 S. & R., 275, it is held, viz.; In an action brought to recover the price of cattle the defendant may set-off the damages sustained, in consequence of a breach of contract, in not delivering a number of sheep purchased by him of the plaintiff at the same time.

The case of Hunt *vs* Gilmore, 59 Penn. State Rep., 450, was an action upon notes given for the purchase of a colliery, and it was held that the defendant could give in evidence damages arising from the failure of the plaintiff to keep his contract and deliver possession of the colliery to the purchaser.

All the facts necessary to constitute a defense are sufficiently set forth in the affidavit and supplemental affidavit. It is sufficient that the defense be stated with certainty to a common intent.

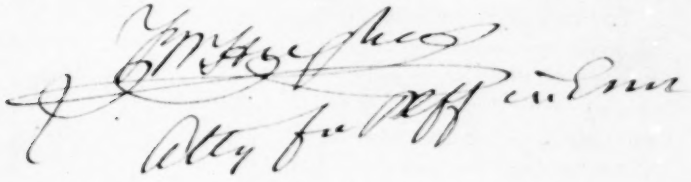
In the case of Thompson *vs.* Clark, 56 Penn. St. Rep. 34, it is held, viz.: It is not necessary that an affidavit of defense should be drawn with so much nicety that no critical skill can suggest an objection; but if it sets forth substantially a good defense it should be supported.

In the case of Leibersperger *vs.* The Reading Savings Bank, 30 Penn. St. Rep. 531, it is held, viz.: Generally it is sufficient if an affidavit of defense sets forth facts showing a substantial *prima facie* defense which can probably be established. It is not necessary for the defendant to meet, by his oath, every objection or argument against his case, which fine critical skill may deduce.

See also to same effect the case of Twitchell *vs.* McMurtrie, 77 Penn. St. Rep., 383.

That the supplemental affidavit was filed in time cannot be questioned at this day in Pennsylvania, for it was filed before judgment, and it has been decided in the case of West *vs.* Simmons, 2 Wharton, 261, that if, after a rule for judgment, the defendant file a supplemental affidavit which is sufficient, it is error to enter judgment.

As to the question whether Congress has power to authorize the creation of national banks it is not proposed to discuss it here; a question so important ought to be presented upon facts more full and explicit than the present case affords. At all events it is not necessary to pass upon this question, as the other grounds for reversal seem to be conclusive.



In the Supreme Court of the United States.

NO. 313, OCTOBER TERM, 1877.

Emanuel Bast, Plaintiff in Error.

vs.

The First National Bank of Ashland, Pennsylvania, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR.

R. M. SCHICK,
G. R. & S. H. KAERCHER,
Counsel for Defendant in Error.

In the Supreme Court of the United States.

NO. 313, OCTOBER TERM, 1877.

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BRIEF OF ARGUMENT.

The statement of the facts of the case contained in the brief of argument, furnished by the plaintiff in error, does not adequately present the questions involved in the record.

The endorsements appearing on the notes sued upon (copies of which notes were filed in the court below in accordance with its practice) were as follows: "Judgment in the Court of Common Pleas of Schuylkill county, of June Term, 1875, No. 1,292, for $7,203.18, being held as collateral for within note."

The three notes were dated 1st March, 1876, and were payable four months after date. Suit was instituted on 2d August, 1876. As collateral had been delivered with the notes, and it had been applied in part liquidation of the notes, the amount realized was a proper credit upon the notes. Consequently, at the time of filing the copies of the notes, the counsel for

the bank filed therewith a copy of the contract or agreement entered into in relation to said collateral. It was as follows: [See record, page 3.]

Know all men by these presents, that I, Emanuel Bast, do hereby transfer and assign to William Torrey, cashier, of Ashland, Pennsylvania, a certain judgment of June term, 1875, in Court of Common Pleas of Schuylkill county, No. 1292, in which the First National Bank of Ashland is plaintiff, and the Ringgold Iron and Coal Company is defendant, and the three several drafts upon which the said judgment was obtained as collateral security for the payment of two notes of $2,000.00 each, and one for $3,481.69, made by me to order of William Torrey, cashier, dated March 1st, 1876, payable in four months after date, and upon failure on my part to pay said notes at maturity, or at the maturity of time, for which the same may be renewed, then the said Torrey, cashier, is hereby authorized and empowered to sell the same at public sale, after ten days' notice, to me, and apply the proceeds thereof to payment of my said notes, and in case the proceeds of same shall not be sufficient to pay said notes, then I promise to pay any balance that may be due.

In witness whereof I have hereunto set my hand and seal this 1st day of March, 1876.

EMANUEL BAST. [SEAL.]

Witness—A. P. SPINNEY, S. HENRY NORRIS.

It further appeared from the statement filed—"That in pursuance of the above agreement the said judgment and drafts were sold:

"The sale amounted to - - -		$2,150.00
"The auctioneer's charge was -	$5.00	
"The cost of advertising was -	4.00	
		9.00
		2,144.00

The court entered judgment for want of a sufficient affidavit of defence, for the amount of the notes sued upon, less the above stated amount realized from the sale of the collateral.

From the record before the court, it appeared that the notes were due and unpaid; that with them had been delivered certain collaterals, and by the terms of the written assignment, accompanying the same, Emanuel Bast, the defendant, had stipulated as follows: "Upon failure on my part to pay said notes at maturity, or at the maturity of time, for which the same may be renewed, then the said Torrey, cashier, is hereby authorized and empowered to sell the same at public sale, after ten days' notice, to me, and apply the proceeds thereof to payment of my said notes, and in case the proceeds of same shall not be sufficient to pay said notes, then I promise to pay any balance that may be due."

Now, the affidavits of defence do not deny the execution of this agreement, nor do they aver that any mistake or fraud occurred or was practiced by which its validity can be impeached.

The affidavit of defence, ignores by its silence, this written assignment and contract, and sets forth that simultaneously with the delivery of the notes sued upon, that the said Bast "assigned to said plaintiffs a certain judgment." That the judgment was then

has been cited to sustain this legal proposition. The taking of a note payable at a future date, has always been held to be a valid agreement to forbear to proceed upon the debt or contract on account of which it was given. It is submitted that the legal presumption, in the absence of an express contract to the contrary, is that the collateral is given to secure forbearance, and to sell or dispose of it, in advance of the maturity of the debt would be a violation of the bailment which the law would declare to exist in such a case.

Seeing that the law would not recognize as an implied duty, what was contrary to legal presumption, the defendant undertook to eke out his affidavit by avering that simultaneously with his delivery of said notes to the banks, as well as the assignment of the judgment, as collateral security for the same, it was agreed that the bank would proceed to issue execution on the judgment whenever the money could be made thereon.

It is to be observed that the affidavits aver the "assignment" of the collateral, but no where set out the terms of the assignment, except to claim that simultaneously therewith it was agreed, &c., as above stated. No after agreement is averred by which the contract then entered into was changed—it was simultaneous therewith. By assignment is meant, the *written* transfer of the interest. The affidavits of defence would be fatally defective in failing to set forth for the information of the Court, the assignment which defendant declares to exist, and yet does not disclose. The parties having put this contract of

assignment in writing, are bound by it. They cannot enlarge or alter it by parol evidence, except upon proof of fraud or mistake, neither of which are averred. If Bast rests upon the production of the assignment and filing of the same of record by the plaintiff, as sufficient to relieve him from setting the same forth, then what is his position.

That, on the first day of March, 1876, he executed his three promissory notes, payable in four months, and delivered and assigned "simultaneously" therewith to the bank, certain collaterals, by written assignment, from which it appears that the collateral was to be held, not only for the notes then given, but for any renewals thereof—thus effectually and expressly rebutting the alleged agreement that the collaterals were to be used *before* the maturity of the notes sued upon. But the alleged agreement is in further conflict with the written assignment in averring that it was the duty of the bank to proceed by execution upon the assigned judgment, whereas the assignment expressly points out the manner in which, and the time when the collaterals are to be disposed of, viz: By public sale after notice. Thus upon the whole record it appeared that the defence set up, did not, in law, constitute a legal defence to the plaintiff's claim. That the proposed defence could not avail or be received to defeat the plaintiff's recovery, because the same would contradict the written assignment of the parties. The rule as laid down by Greenleaf on Evidence, and all other authorities on the subject, that parol contemporaneous evidence is inadmissable to contradict or vary the terms of a valid written in-

strument, is in full force in Pennsylvania.

If we lay aside the written agreement of the parties, viz: the assignment, as containing the terms regulating the disposition of the collateral, what facts have we alleged in the affidavit to establish the "supine negligence" charged upon the bank. Simply that the bank, at the time of taking the promissory notes, which were to run for four months, from 1st March, 1876, agreed to issue execution on the collateral judgment, then assigned, whenever the money could be made thereon; that the money could have been made thereon, if execution had been issued thereon on 19th May, 1876, more than two months before the maturity of the notes, and that the bank failed to do so.

It is nowhere stated in the affidavit that the bank had any knowledge that the judgment was then collectible, or that it had ever been so informed. It is not averred that prior to that time that the bank had any notice to proceed upon the collateral, or that the money could be made thereon. Not only is no knowledge imputed to the bank in this respect, but it is not even averred that such information was accessible to the bank. No act of negligence or omission on the part of the bank, in this respect, is pointed out in the affidavits. Surely, there is nothing, in the mere fact of the bank failing to proceed upon the collateral within forty-nine days after it was given to secure payment of a debt not maturing for one hundred and twenty days, and without knowledge that the collateral was then collectible and without any notice to proceed that by any legal

dexterity, can be construed to constitute "supine negligence" on the part of the bank. Yet this is the only defence averred, and the facts stated not supporting it, the Court below could not do otherwise than enter judgment for want of a sufficient affidavit of defence.

In regard to the numerous authorities cited to prove that the loss of collateral through the supine negligence of the creditor, operates as an extinguishment of the debt to the amount of the value of the collateral, it will be sufficient for the Court to consider them when a case arises, the facts of which involve such a question.

R. M. Schick
G. R. Kaercher
for Dft. in Error